

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

RUTH ELY GILLIAM,

Plaintiff,

v.

LEE COUNTY SCHOOL BOARD,

Defendant.

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Case No. 2:01CV00083

OPINION AND ORDER

By: James P. Jones

United States District Judge

Terry C. Kilgore, Wolfe, Williams & Rutherford, Gate City, Virginia, for Plaintiff; Steven R. Minor, Elliott Lawson & Pomrenke, Bristol, Virginia, for Defendant.

In this action the plaintiff seeks monetary and injunctive relief pursuant to federal law on the ground that she was demoted from her job by the defendant on account of her age, sex, and political affiliation. On July 26, 2002, the defendant filed a motion for summary judgment under Federal Rule of Civil Procedure 56. Pursuant to the scheduling order entered in this case, any response to the motion was required to be filed prior to the date of the hearing, or, in any event, no later than fourteen days after service of the motion. Accordingly, any response by the plaintiff was due no later than August 12, 2002.¹

¹ This calculation assumes that the motion for summary judgment was served by mail or electronic means, thus adding three extra days to the due date. *See* Fed. R. Civ. P. 6(e). The motion

A hearing on the motion for summary judgment was scheduled and noticed for August 15, 2002, at the courthouse in Abingdon. On that same day, the plaintiff filed with the clerk in Big Stone Gap a written response to the motion for summary judgment, consisting of a letter brief and portions of transcripts of seven depositions taken in the case.² In the letter brief, counsel for the plaintiff requested the court to accept the late filing “as I was out of town on vacation for the past several days.”

At the time of the hearing on the motion for summary judgment on August 15, the court had not yet had any opportunity to consider the letter brief and did not have the deposition transcripts offered in opposition to the motion.

The question before the court is whether the late filing of the response to the motion for summary judgment ought to be allowed and the material contained in the response considered by the court.

The court has the discretion to allow an enlargement of time after the time has expired where the failure to timely file was as a result of “excusable neglect.” Fed. R. Civ. P. 6(b)(2). The fact that the attorney for the plaintiff was “out of town on vacation for the past several days” does not constitute excusable neglect. *See Byrd v. City of Fayetteville*, 110 F.R.D. 71, 73-74 (E.D.N.C. 1986) (excusable neglect

for summary judgment does not recite how it was served.

² The plaintiff’s attorney had sent by facsimile to chambers a copy of the letter brief on the afternoon of August 14.

requires showing of “unique or extraordinary” circumstances). The attorney’s disregard of the court’s scheduling order, which prevented the hearing on the motion for summary judgment from having any meaningful purpose, certainly does not justify an extension. *See Boon Partners v. Advanced Fin. Concepts, Inc.*, 917 F. Supp. 392, 394-395 (E.D.N.C. 1996) (failure to read local rules did not constitute excusable neglect).

On the other hand, it would be unjust under these circumstances to penalize the plaintiff for her attorney’s failure. Moreover, for whatever reason, the defendant does not object to the request for an extension of time.³ After balancing the equities in this case, I will exercise my discretion to permit the late filing of the response to the motion for summary judgment.

Because of the delay in the submission of the motion for summary judgment, caused by the attorney’s late filing, I will cancel the current trial date and refer the motion for summary judgment to the magistrate judge for a report and recommendation.

³ In his letter brief, the attorney for the plaintiff stated that “the Defendant has graciously agreed to this late filing” and at the hearing counsel for the defendant confirmed that he had previously advised the plaintiff’s attorney that he had no objection to the late filing. Of course, the parties do not control the court’s docket and cannot between themselves agree to extensions under Rule 6(b). Had a prior request for a late filing been made to the court and granted, the hearing on the motion for summary judgment could have been postponed in order to allow the court an opportunity to consider the record and prepare for oral argument.

For the reasons stated, it is **ORDERED** as follows:

1. The request for an extension of time for the plaintiff to respond to the motion for summary judgment is granted and the response submitted August 15, 2002, is deemed timely filed;
2. The current trial date is cancelled; and
3. The defendant's motion for summary judgment is referred to the Honorable Pamela Meade Sargent, United States Magistrate Judge, pursuant to 28 U.S.C.A. § 636(b)(1)(B) (West 1993 & Supp. 2002) and Fed. R. Civ. P. 54(d)(2)(D) and 72(b), to conduct any proceedings that may be necessary (including oral argument if desired by the magistrate judge) and to submit to the court a report setting forth appropriate findings and recommendations pursuant to 28 U.S.C.A. § 636(b)(1)(C) (West 1993 & Supp. 2002). In the event objections are timely filed to the report of the magistrate judge, the objections will be determined by the court without further briefing or oral argument, unless a party expressly requests further briefing or oral argument at the time of filing of objections or in the response thereto.

ENTER: September 10, 2002

United States District Judge